LIM LEK YAN A

v.

YAYASAN MELAKA

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI J
[BANKRUPTCY NO: D-29-3349-2010]
30 JULY 2012

BANKRUPTCY: *Notice - Setting aside - Whether amount stated in notice erroneous - Whether judgment creditor was required to account for value of properties pledged as security into account when notice issued - Whether judgment creditor breached its duty to state correct amount in notice - Whether interest claimed rendered notice invalid and void - Whether issue of properties and issue of interest attracted principle of res judicata - Whether judgment creditor had given judgment creditor notice that amount claimed in notice was wrong* C D

CIVIL PROCEDURE: *Res judicata - Whether issue of properties and issue of interest could have been raised and decided in earlier proceedings - Whether judgment creditor's failure to raise issues attracted principle of issue estoppel and res judicata* E

When Photran Corporation Sdn Bhd ('Photran') defaulted in its loan repayment to Yayasan Melaka ('the judgment creditor'), the judgment creditor commenced an action against Photran and also the guarantor of the loan, Lim Lek Yan ('the judgment debtor'). On 25 January 2005, the judgment creditor ('JC') entered summary judgment against the judgment debtor ('JD'). The JD's appeal against the summary judgment was dismissed by the Court of Appeal and his application for leave to appeal to the Federal Court was also dismissed. On 23 August 2010, the JC issued a bankruptcy notice ('BN') against the JD, which the latter attempted to set aside by way of an affidavit and also by way of a summons in chambers application. However, the Senior Assistant Registrar ('the SAR') dismissed the same. The JD appealed to the judge in chambers who also dismissed the JD's application. When a second BN was filed on 23 August 2010, the judgment debtor filed an application ('encl. 28') to set aside the second BN. The main ground cited in encl. 28 was that the F G H I

A amount claimed in the BN was erroneous. When the SAR dismissed encl. 28, the appellant filed the present appeal to the judge in chambers ('encl. 54'). In this appeal, the JD submitted that the amount stated in the BN was erroneous because the JC had failed to disclose material evidence, namely the properties
B furnished as security by the JD in respect of the letter of indemnity, which the JD argued would have reduced the amount he owed to the JC. The JD further submitted that the interest claimed had rendered the BN invalid and void.

C **Held (dismissing encl. 54 with costs):**

(1) There was no obligation on the part of the JC to take the value of the properties pledged as security into account before or at the time of issuance of the BN. The JC was only required to account for the value of properties when issuing
D the creditor's petition. Even if there was an obligation on the part of the JC to provide a value for the properties when the BN was issued, the JC was not in a position to do so as the JD had failed to transfer the said properties to the JC as provided for under the letter of indemnity when requested to
E do so. The JC had only obtained the order to compel the JD to transfer the properties to the JC after the BN was issued. Thus, the properties had not been sold at the time when the BN was issued and there were no proceeds of sale to be taken into account to reduce the sum due and payable by the
F JD in the BN. As such, the sum stated in the BN without taking into account the value of the properties was not erroneous. Further, the issue of the properties could and should have been raised as part of the JD's grounds of application to set aside the first BN issued by the JC. The
G fact that the JD failed to do so attracted the principle of issue estoppel and *res judicata* to apply against the JD. (para 23)

(2) The interest claimed by the JC was judgment interest or interest granted by the court at 8% per annum on the
H judgment sum and not pre-judgment interest as submitted by the JD. There was nothing illegal in the claim for the judgment interest in the BN and the amount stated in the BN was not excessive. Further, as the issue of interest was not a new issue discovered in the present proceedings the JD was estopped
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from raising this issue now. This would be a proper case for the court to invoke the application of the principle of *res judicata* against the JD. (para 30)

(3) It is trite law that if the JD challenged the validity of the BN, on the grounds that the amount claimed in the BN exceeded the amount actually due, that he ought to have given the JC notice of this fact within seven days from the date of receipt of the BN. As the JD had not done so in this case, he could not now claim to invalidate the BN on the grounds that the amount stated in the BN was wrong. (para 31)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bintulu Realty Estate Sdn Bhd v. Samat Hj Othman [1993] 4 CLJ 571 HC ***(refd)***

Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd [2009] 5 CLJ 501 CA ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(refd)***

Muir v. Jenks [1913] 2 KB 412 ***(refd)***

Re Fong Yuan Kwong, ex parte Public Bank Berhad [1995] 1 LNS 203 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii), 5(2)
Bankruptcy Rules 1969, rr. 18, 91, 95
Civil Law Act 1956, s. 11

For the judgment creditor - Andrew Chiew (SM Shanmugam & Ainaa Shahirah with him); M/s Lee Hishamuddin Allen & Gledhill

For the judgment debtor - GK Ganesan (Philip Choong & KN Geetha with him); M/s Philip Choong & Co

Reported by Vani Krishnan

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JUDGMENT

Mah Weng Kwai J:

Historical Facts

B **[1]** On 30 June 2003 Yayasan Melaka, the judgment creditor, commenced an action against Photran Corporation Sdn Bhd ('Photran') to recover the amount outstanding under a loan agreement and against Lim Lek Yan, the judgment debtor, for indemnity for its losses under a letter of indemnity in Kuala C Lumpur High Court Civil Suit No. D8-22-1054-2003 ('the D8 Suit').

[2] On 25 January 2005, the judgment creditor entered summary judgment ('the D8 judgment') against the judgment debtor and D struck out the judgment debtor's counterclaim.

[3] The judgment debtor appealed to the Court of Appeal against the D8 judgment. The appeal was dismissed by the Court of Appeal on 12 June 2007.

E **[4]** On 12 July 2007, the judgment debtor filed a motion for leave to appeal to the Federal Court. The application for leave was dismissed on 7 January 2008.

[5] On 5 February 2008, the judgment debtor filed an F application to the Federal Court to review its decision. This application was dismissed on 3 June 2009.

[6] On 23 August 2010 the judgment creditor issued the bankruptcy notice against the judgment debtor.

G **[7]** On 11 October 2010, the judgment debtor applied to set aside the bankruptcy notice by way of an affidavit filed under r. 95 of the Bankruptcy Rules 1969 ('the Rules') ('encl. 4') and by summons in chambers under rr. 18 and 95 of the Rules ('encl. 6').

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[8] The learned Senior Assistant Registrar dismissed encls. 4 and 6 on 21 January 2011 and the judgment debtor appealed against the said decisions to the judge in chambers.

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[9] On 21 March 2011, the judgment debtor filed another application ('encl. 28') to set aside the bankruptcy notice under r. 18 of the Rules.

[10] On 23 March 2011 the judgment debtor's appeals to the judge in chambers against the dismissal of encls. 4 and 6 by the learned Senior Assistant Registrar were dismissed by the judge in chambers.

[11] The judgment debtor appealed against the decisions of the court delivered on 23 March 2011 to the Court of Appeal. The appeals in the Court of Appeal are pending.

[12] On 17 November 2011, the learned Senior Assistant Registrar dismissed encl. 28 and on 23 November 2011, the judgment debtor appealed against this decision to the judge in chambers *vide* encl. 54.

Judgment Debtor's Grounds To Set Aside The Bankruptcy Notice Dated 23 August 2010

[13] The main ground cited in encl. 28 was that the judgment creditor had failed to take into account the value of three properties ('the properties') described in the letter of indemnity which the judgment creditor had acquired pursuant to the order of court dated 1 December 2010 and as such the amount claimed in the bankruptcy notice was erroneous.

[14] The grounds relied on by the judgment debtor in the hearing of encl. 54 were that:

(a) the judgment creditor did not discharge its statutory duty to prove its debt and by failing to disclose material evidence the bankruptcy notice did not satisfy the requirement of s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act');

(b) the amount stated in the bankruptcy notice was wrong in fact and in law;

(c) the judgment on which the bankruptcy notice was premised is unlawful and incomplete;

(d) the liability of the judgment debtor is as a surety to Photran and as Photran did not owe anything to the judgment creditor, the judgment debtor was not indebted to the judgment creditor; and

A (e) the D8 judgment was obtained by fraud, collusion or by miscarriage of justice by Photran's servants who were in control of both the judgment creditor and Photran.

Judgment Creditor's Grounds To Oppose Encl. 28 And 54

B **[15]** The judgment creditor submitted that encl. 54 should be dismissed because:

(a) the judgment creditor is not required to take into account the value of the properties;

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(b) the judgment debtor cannot raise the issue of the alleged erroneous amount stated in the bankruptcy notice as no notice was given under s. 3(2)(ii) of the Act; and

D (c) of the application of the principles of *res judicata* and issue estoppel.

Decision Of The Court

[16] Upon a consideration of encls. 28 and 54 and the affidavits E filed in relation thereto and upon reading the written submissions of counsel for the judgment debtor and the judgment creditor and upon hearing the oral submissions of counsel aforesaid, the court on 5 June 2012 dismissed encl. 54 with costs.

F **[17]** The judgment debtor now appeals against the said decision.

Grounds Of Decision

[18] Essentially, this appeal is hinged on two issues namely (1) whether the amount stated in the bankruptcy notice was G erroneous and (2) whether the interest claimed rendered the bankruptcy notice invalid and void.

Issue 1 - Whether The Amount Stated In The Bankruptcy Notice Was Erroneous

H **[19]** The judgment debtor contended that the judgment creditor had failed in its statutory duty to "prove" its debt in that the judgment creditor had failed or refused to take into account the value of the properties in Bangsar, Kuala Lumpur, pledged by the judgment debtor as security in support of his letter of indemnity I in the bankruptcy notice which would have reduced the amount

owing by the judgment debtor and that such a defect or omission is fatal and incurable. Counsel for the judgment debtor further contended that the judgment creditor had breached its duty to state the correct amount in the bankruptcy notice and relied on the case of *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263 where it was held that a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution, and on s. 3(1)(i) of the Act.

[20] The properties in question said to be worth about RM3 million, were acquired by the judgment creditor on 1 December 2010 pursuant to an order of the Kuala Lumpur High Court which declared that the judgment creditor is the beneficial owner of the properties. Counsel for the judgment debtor argued that the alleged right to the properties had in fact accrued to the judgment creditor in 1997 under the letter of indemnity dated 26 July 1997 and that the judgment debtor's liability as guarantor arose when Photran defaulted on 26 June 1999. This meant that the beneficial interest in the properties accrued to the judgment creditor at the latest on 26 June 1999, the date of default. Counsel further argued that the judgment creditor was duty bound to correct the sum owing by the judgment debtor in the bankruptcy notice and on the authority of *Bintulu Realty Estate Sdn Bhd v. Samat Hj Othman* [1993] 4 CLJ 571 a mistake cannot be corrected at the later proof of debt stage and the bankruptcy notice was rendered defective and void.

[21] In the *Bintulu* case (*supra*) it was held by Richard Malanjum J (now CJ of Sabah & Sarawak) that the difference in the amount between the actual sum due and the judgment debt cannot be reduced later by the official assignee as it would be tantamount to allowing a judgment to be divisible which should not be the case.

[22] Lastly on this point, counsel for the judgment debtor submitted that the properties would have been valued in 1997 or at the latest in 1999 when the judgment debtor delivered the relevant documents including the original title to the judgment creditor's previous solicitors on 21 January 1999. Counsel further submitted that the judgment creditor's right to the properties accrued on account of the breach by Photran on 26 June 1999.

A There was thus no basis for the judgment creditor to say that it was unable to value the said properties in 1997 or 1999 and that the delay in the valuation was through no fault of the judgment debtor.

B **[23]** The court is of the view that there was no obligation on the part of the judgment creditor to take the value of the properties into account before or at the time of the issuance of the bankruptcy notice for the following reasons:

C (a) Firstly, the court accepted the submission of counsel for the judgment creditor that the properties were only meant to be a security furnished by the judgment debtor in respect of the letter of indemnity (see cls. 4, 5 and 6 of the letter of indemnity) with a right of redemption. It was an equitable charge created in favour of the judgment creditor once the D judgment debtor signed the letter of indemnity with a proviso for the retransfer of the properties upon settlement of the loan. (see *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 @ 235). The properties were not to be transferred to the judgment E creditor as legal owners before any alleged breaches by Photran.

(b) That being the case there was no obligation on the part of the judgment creditor to give a value to the properties F and then to reduce the amount stated in the bankruptcy notice. There is no requirement under r. 91 of the Rules nor in Form 5 to "give value for a security" when the bankruptcy notice is issued. The judgment creditor is only required to account for the value of the properties when issuing the G creditor's petition (see Form 9, Bankruptcy Rules 1969 and *Re Fong Yuan Kwong, ex parte Public Bank Berhad* [1995] 1 LNS 203; [1996] 4 MLJ 42 where it was held that s. 5(2) of the Act requires the petitioning creditor as a secured creditor to state his willingness to give up the security or give an estimate H of the value of the security held).

It will be noted that in para. 3 of Form 9 of the Rules the format for the creditor's petition in the case of a secured creditor, specifically provides as follows:

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> that I hold security for the payment of (or part of) the said sum (but that I will give up such security for the benefit of the creditors of … in the event of his being adjudged bankrupt) (or and I estimate the value of such security the sum of RM …)

This is in stark contrast to the format of the bankruptcy notice in Form 5. Here, there is no provision for an estimate of the value of a security to be stated by the judgment creditor. On the contrary in Form 5, the judgment debtor must satisfy the court that he has a counterclaim, set off or cross demand against the judgment creditor which equals or exceeds the sum claimed.

(c) Secondly, even if there was an obligation on the part of the judgment creditor to provide a value for the properties when the bankruptcy notice was issued, the judgment creditor was not in a position to do so as the judgment debtor had failed to transfer the said properties to the judgment creditor as provided for under the letter of indemnity when requested to do so.

(d) The judgment creditor was compelled to apply to court *vide* the originating summons dated 8 May 2009 for a declaratory order of beneficial ownership to compel the judgment debtor to transfer the properties to the judgment creditor. The order was only obtained by the judgment creditor on 1 December 2010 whereas the bankruptcy notice was issued earlier on 23 August 2010. And importantly, there was no quantum to be taken into account at the time of the bankruptcy notice as the properties had not been sold and as such there were no proceeds of sale to be taken into account to reduce the sum due and payable by the judgment debtor in the bankruptcy notice.

(e) Issue was taken by counsel for the judgment debtor that the titles to the properties had in fact been forwarded to the judgment creditor's former solicitors on 21 January 1999 but as two of the three titles went missing the delay in the transfer of the properties to the judgment creditor was not due to the fault of the judgment debtor but attributable to the judgment creditor themselves.

A (f) On this issue, the court is of the view that regardless of the reason for the delay in the transfer and as to who was responsible for the resultant delay in the disposal of the properties, the fact remains that as at the date of the issuance of the bankruptcy notice, there were no proceeds of sale to
B speak of and to be taken into account.

(g) Counsel for the judgment debtor contended that as the equitable right had passed to the judgment creditor, there was no need for the declaratory order and relied on *Muir v. Jenks*
C [1913] 2 KB 412 for the proposition in law that a bankruptcy notice founded on an erroneous sum was defective.

(h) However, for reasons stated above and notwithstanding the principle in *Muir v. Jenks* (*supra*), the court is of the view that the sum stated in the bankruptcy notice without taking into
D account the value of the properties was not erroneous in the circumstances.

Issue 2 - Whether The Amount Claimed In The Bankruptcy Notice Was Excessive As It Included Interest Which Is Not Chargeable

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[24] Summary judgment was entered by the judgment creditor on 25 January 2005. The learned Senior Assistant Registrar allowed interest to run on the judgment sum from 26 June 1999, the date of default in the loan agreement. Counsel for the judgment debtor
F contended that learned Senior Assistant Registrar had erred in law when granting interest on the judgment sum as there was "no provision for pre-judgment interest in the letter of indemnity" and that the inclusion of a claim for interest in the bankruptcy notice was wrong and defective.

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[25] Counsel for the judgment creditor objected to the issue of interest being argued in this appeal as the judgment debtor had not raised this as an issue in the hearing of encl. 28 before learned Senior Assistant Registrar. Counsel for the judgment
H creditor contended that the issue of interest ought to have been taken by the judgment debtor in the hearing of encls. 4 and 6 (and the subsequent appeal in encl. 26) in a holistic manner and as it was not done, the judgment debtor is estopped from raising it at this juncture.

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[26] In deciding the point raised, the court is of the view that as a Bankruptcy Court it had the jurisdiction to consider any issue relating to the quantum claimed in the bankruptcy notice and accordingly leave was allowed to counsel for the judgment debtor to raise the issue of interest in his oral submission.

[27] Counsel for the judgment debtor referred to the loan agreement and took pains to highlight the fact that no interest was to be imposed on Photran in the event of default. (see Part 6 - s. 1, Part 7 - s. 1, s. 2(1) and s. 2(2) of the loan agreement) and any claim for interest in the bankruptcy notice was troubling as it was illegal.

[28] The court is of the view that the amount claimed by way of interest in the bankruptcy notice was not excessive as it was interest granted by the court as judgment interest at 8% per annum on the judgment sum. It cannot be disputed that the court has the power to grant interest on a judgment sum as provided for in s. 11 of the Civil Law Act 1956. The interest claimed by the judgment creditor was not contractual interest and as rightly pointed out by counsel for the judgment debtor, the judgment creditor could not have claimed for contractual interest as there was no provision for the imposition of interest in the loan agreement.

[29] Counsel for the judgment debtor failed to realise or rather did not wish to realise that the interest claimed was judgment interest and not pre judgment interest as submitted. The court agreed with counsel for the judgment creditor that the argument of the judgment debtor amounted to an indirect attempt to challenge the validity of the judgment itself, something which the judgment debtor ought not to do as the judgment is a final judgment with the judgment debtor having exhausted all avenues of appeal. The judgment debtor ought to have raised it in the O. 14 proceedings when he was opposing the application but failed to do so.

[30] The court is of the view that there was nothing illegal in the claim for the judgment interest in the bankruptcy notice and that the amount stated in the bankruptcy notice is not excessive. The judgment debtor ought to have raised the issue of interest in the hearing of encls. 4 and 6 as it was not a new issue "discovered" after encls. 4 and 6 were heard and determined by the court. The

judgment debtor is estopped and cannot be allowed to raise issues in submission by instalments. This would be a proper case for the court to invoke the application of the principle of *res judicata* against the judgment debtor. The bankruptcy notice in question was a second bankruptcy notice which was filed on 23 August 2010. The element of interest which forms the basis of the judgment debtor's complaint was known to the judgment debtor since 25 January 2005. The court is of the view that there is no merit in the argument of counsel for the judgment debtor that even if it was judgment interest, including the interest in the bankruptcy notice would render it void. No reasons were proferred in support of this proposition.

Notice

[31] It is trite that where there is any dispute on the amount claimed in the bankruptcy notice, notice disputing such amount ought to be given to the judgment creditor within seven days from the date of receipt of the bankruptcy notice (see s. 3(2)(ii) of the Bankruptcy Act 1967). This the judgment debtor did not do and cannot now claim to invalidate the bankruptcy notice on the ground that the amount stated in the bankruptcy notice is wrong (see *Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd* [2009] 5 CLJ 501 where it was held that the "Proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 provides that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice. It is trite law that any challenge to the validity of a bankruptcy notice on the ground that the amount stated therein exceeds the amount actually due must be made within the time prescribed in the said notice as required by the aforesaid proviso"). The judgment debtor ought to have given notice on the amount disputed by reason of the element of interest and the failure by the judgment creditor to take the value of the properties into account.

Res Judicata/Issue Estoppel - The Properties

[32] The judgment debtor was fully aware of and was opposing the action brought by the judgment creditor to compel the judgment debtor to transfer the properties to them *vide* Kuala Lumpur High Court Originating Summons No. S21-136-2009.

[33] The judgment debtor knew of the properties at the time when the bankruptcy notice was served on him yet the issue of the value of the properties was not raised in encls. 4 and 6 but was instead raised for the first time in a separate application *vide* encl. 28.

[34] Enclosure 28 was filed on 21 March 2011, two days before this court dismissed the judgment debtor's appeals in relation to encls. 4 and 6 on 23 March 2011.

[35] The issue of the properties could and should have been raised as part of the grounds of the application under encls. 4 and 6. The fact that the judgment debtor failed or omitted to do so attracts the principle of issue estoppel and *res judicata* to apply against the judgment debtor. (see *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where the law on *res judicata* was succinctly dealt with by Peh Swee Chin FCJ. See also the cases of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 and *John D'Silva & Anor v. Antony Moses* [2002] 3 CLJ 536).

[36] In the result, on account of all the reasons discussed above, encl. 54 was dismissed with costs.